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CHARLES ELMORE

No. 217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

GUARANTY TRUST COMPANY, EXECUTOR, ETC.,
Appellant,

vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER,
Appellee.

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

BRIEF FOR APPELLANT.

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In The

Supreme Court of the United States

October Term, 1932.

No. 217.

Guaranty Trust Company, Executor, Etc.,
Appellant,

vs.

William H. Blodgett, Tax Commissioner,
Appellee.

Appeal from the Superior Court of Fairfield County, Connecticut.

BRIEF FOR APPELLANT.

This is an appeal from a judgment rendered by the Superior Court of Fairfield County, Connecticut (R. 37), upon advice received from the Supreme Court of Errors (R. 22).

Opinions Below.

The opinion of the Supreme Court of Errors of the State of Connecticut (R. 24), upon the questions of law reserved to it by the Superior Court of Fairfield County (R. 21), is reported in 114 Conn. 207 and 158 Atl. 245. No opinion was delivered by the Superior Court.

Jurisdiction.

Pursuant to Rule 12 (1) of the Rules of this Court, appellant submitted a statement showing that the appeal herein was timely taken, that the judgment from which this appeal was prosecuted was final and rendered by the highest court in which a judgment in the suit could be had, that there was drawn into question the validity of a state statute, and that the decision was in favor of its validity. Appellant also showed that the constitutional questions involved in this appeal were timely and sufficiently raised in the courts below, and that the jurisdiction of this court extends to a determination of the nature of the transaction as well as the validity of the statute, as applied, under the Federal Constitution. On the 10th day of October, 1932, this Court rendered an order noting probable jurisdiction in this cause.

Statutes.

The state statute whose validity, as applied, is drawn into question is Section 1, Chapter 190, Connecticut Public Acts of 1923, which provides as follows:

> "*All property and any interest therein owned by a resident of this state at the time of his decease,* * * * which shall pass by will or inheritance under the laws of this state; and all gifts of *such* property by deed, grant or other conveyance, made in contemplation of death of the grantor or donor, or intended to take effect in possession or enjoyment at or after the death of such grantor or donor, shall be subject to the tax herein prescribed." (Italics supplied).

Appellant claims that while interpreting and applying the above statute and while expressly holding that it was applicable to the present case, the court below really gave effect to a later amendment to the above statute, to wit:

Sections 1 and 2, Chapter 299, Public Acts of 1929 (Gen. Stat. 1930, Secs. 1360 and 1361), which provides:

> "**Sec. 1360. Tax on Transfers of Property.** A tax is imposed, * * * upon transfers, in trust or otherwise, of the following property or any interest therein or income therefrom: (a) When the transfer is from a resident of this state; * * * (enumerating types of transfers).
>
> "**Sec. 1361. Transfers, when taxable.** The transfers enumerated in Section 1360 shall be taxable if made: * * * (d) by gift or grant intended to take effect in possession or enjoyment at or after the death of the transferor. A transfer of property in respect of which the transferor reserves to himself a life income or interest shall be construed prima facie to have been intended to take effect in possession or enjoyment at death; * * *."

The validity of this amendment, as applied, is likewise drawn into question in the present case.

Statement of Facts.

The facts of the case are succinctly stated by the Supreme Court of Errors as follows (R. 24):

> "Harriet D. Sewell died on May 20, 1930, domiciled in Greenwich. On December 28, 1926, she executed an irrevocable deed of trust to a New York trust company of certain securities therein described, in which deed it was provided that the trustee collect the income and pay it to Mrs. Sewell during her life; upon her death the income was to be paid to her husband during his life, and upon his death the trustee was directed to pay and transfer the principal of the trust absolutely to their daughter, if she survived; but if not, then to the issue of the daughter, with a gift over in default of such issue."

After Mrs. Sewell's death, appellant, as executor, filed a copy of the trust deed, and a list of the securities trans-

ferred, with the Probate Court for the District of Greenwich. The Tax Commissioner contested appellant's claim that the trust property transferred under the deed was not subject to the Connecticut succession tax, and on December 11, 1930, the Probate Court rendered a decree that the property forming this trust was not subject to the tax.

The Commissioner appealed to the Superior Court of Fairfield County, where the above facts were stipulated, and, in addition, "*that said transfer was not made by the decedent in contemplation of death*" (R. 3). Appellant and appellee also filed a "stipulation of questions of law" (R. 21), with a request that these questions be reserved for the advice of the Supreme Court of Errors. The questions were so reserved (R. 22), and the Supreme Court of Errors rendered an opinion and order (R. 22-37), holding (i) that the property which was the subject of the transfer passed by deed, grant or gift intended to take effect in possession or enjoyment at the death of the grantor or donor within the meaning of the Connecticut succession tax statute in force at the execution of the instrument of transfer; (ii) that the imposition of such tax thereon transgressed no provision of the United States Constitution, meaning thereby the due process and equal protection clauses of the 14th Amendment and the contract clause of Article 1, Section 10 (R. 45); (iii) that the entire property should be valued as of the date of the death of the decedent, and (iv) that the tax should be computed on such valuation.

The Superior Court of Fairfield County then entered a judgment giving full effect to the advice of the Supreme Court of Errors. From this judgment appellant appealed to this Court.

Assignment of Errors.

Appellant contends that in so deciding this case, the Court below erred in the following particulars:

1. In holding that the property which was the subject of transfer by the indenture dated December 28th, 1926, passed by deed, grant or gift intended to take effect in possession or enjoyment at the death of the grantor or donor.

2. In failing to hold that the property in question passed absolutely as of the date of said transfer and not at the death of the grantor.

3. In failing to hold that at the decedent's death she retained no interest in the property, the transfer of which was subject to the succession tax imposed by Chapter 190 of the Connecticut Public Acts of 1923.

4. In holding that the tax, as applied to the stipulated facts in this cause, was valid and did not deprive appellant of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

5. In holding that the tax, as applied to the stipulated facts in this cause, was valid and did not deny to appellant and those claiming under it the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States.

6. In holding that the tax, as imposed, did not impair the obligations of a contract, to wit: the trust deed of Dec. 28, 1926, contrary to Article I, Section 10 of the Constitution of the United States.

SUMMARY OF ARGUMENT.

I. The court below erred in holding that the transfer in question was intended to take effect in possession or enjoyment at the death of the donor.

A. The trust deed resulting in the transfer constituted a contract.

B. The nature and effect of the contract was to vest the grantor, trustee, grantor's husband and her daughter with definite rights as of the date of the transfer.

C. Such contracts or deeds of trust have been before this Court in previous cases, and in all of them this Court held that an irrevocable trust operated to fix the rights to the property as of the time of the transfer, not as of the time of the decedent's death. This conclusion was reached by this Court, irrespective of whether the tax was imposed on the right to transmit the property or on the right to receive it. For while the nature of the transfer may affect the imposition of the tax, the latter does not determine the nature of the transfer which is already accomplished when the tax is imposed.

II. In imposing the tax the state violated the contract clause of Article I, Section 10 of the Constitution.

A. While the Court expressly held that the tax was governed by the statute in force at the time of the transfer, it actually gave effect to a statute enacted after the transfer.

(1) Appellant submits that the tax in question is not sustainable under the earlier statute, but is sustainable under the later statute, and

therefore it must be held that the later statute was applied.

(2) There are ample differences between the two statutes. The basis of the tax under the earlier statute is the property or any interest therein owned by the decedent at the time of her death. The later statute is made applicable also to property transferred before death and no longed owned by the decedent at the time of her death. Only under the later statute can the tax be imposed in this case. Furthermore, under the earlier statute, the question of intent to make the transfer take effect in possession or enjoyment at or after death is determinable by competent evidence from the instrument of transfer or from other sources. The later statute raises a presumption that a transfer in trust reserving a life interest is prima facie one intended to take effect at the death of the grantor. There was no evidence in this case to controvert the written instrument, and the conclusion of the court below could not be arrived at except through the presumption of the 1929 statute.

B. Since effect was given to a later statute, a question is properly raised under the contract clause, and this Court will give independent consideration to the question whether there was a contract, what was its nature and effect and whether any obligations thereunder have been impaired.

C. The imposition of the tax had to proceed on the assumption that the property which had already been transferred inter vivos, four years before death, continued to remain in the decedent until her death. thus impairing the rights and obligations under the contract.

III. The tax as imposed also violated the due process clause.

A. Under the appellant's claim that this constitutional provision has been violated, this Court will give independent consideration to the nature of the transaction which resulted in the transfer of the property.

B. The application of the 1929 Act was without due process because

(1) it changed and widened the basis of the tax, including therein the present transfer which could not be taxed under the earlier act;

(2) the retroactive application of this presumption in the 1929 Statute is likewise without due process.

C. It seems, furthermore, that the court below applied an absolute presumption that whenever a life income or interest is retained by the donor, the transfer takes place at death. Such an absolute presumption is clearly without due process, whether under the 1929 or 1923 statute.

D. Even if the court below gave effect to the 1923 Statute, the tax was without due process.

(1) Death duties may not be imposed on gifts inter vivos which are absolute during the life of the donor. The conclusion is inescapable that property transferred during lifetime through an irrevocable trust is not subject to death duties, unless made in contemplation of death. This transfer, it is stipulated, was not made in contemplation of death.

(2) The tax is not sustainable as a property tax, because the property was without the tax-

ing jurisdiction of the State of Connecticut. Nor is the tax sustainable as a gift tax, because the basis of the tax was the value of the property at the decedent's death, not as of the time when the gift was made.

IV. The tax as applied violated the equal protection clause.

A. The court below interpreted the statute to mean that the tax was imposed not on the succession to the property upon the decedent's death, but on the succession to the possession and enjoyment of the property. Thus interpreted, the statute imposes a gift tax, not an inheritance tax.

B. Considered as a gift tax, the classification is so arbitrary and unreasonable as to amount to a denial of equal protection.

V. The judgment of the court below should therefore be reversed as violative of the above provisions of the federal Constitution.

ARGUMENT.

Appellant submits that the deed of trust constituted a contract, the obligations of which have been impaired by the judgment holding that the transfer in question was intended to take effect in possession or enjoyment at the decedent's death, and that the property transferred was therefore subject to the Connecticut succession tax; also that the tax, as applied, was contrary to appellant's rights under the due process and equal protection clauses of the Fourteenth Amendment.

POINT I.

The Court Below Erred In Holding That The Transfer In Question Was Intended To Take Effect In Possession Or Enjoyment At The Death Of The Donor.

A. THE TRUST DEED CONSTITUTED A CONTRACT.

By the indenture dated December 28, 1926 (R. 5-9), Mrs. Sewell, as party of the first part, agreed to and did transfer to the Guaranty Trust Company, as party of the second part, the securities set forth in the schedule annexed to and made part of the instrument. The Trust Company agreed to and did accept the property, agreed to hold the same for uses specified in the instrument, and agreed to administer the property. In addition to the mutual promises and agreements, there was good and valuable consideration for the promises made by the Guaranty Trust Company, namely, the payment of compensation as provided in Paragraph 12 of the indenture, and there was good and valuable consideration for the promises and agreements of Mrs. Sewell, namely, the payment of income from the property during her lifetime and to her husband during his lifetime, and also the management of the property.

This trust deed contains all the elements of a contract and is analogous to the instruments in *Coolidge v. Long*, 282 U. S. 582, as to which this Court said (p. 595):

> "The trust deeds are contracts within the meaning of the contract clause of the federal Constitution."

B. NATURE AND EFFECT OF THE CONTRACT.

Under this contract, title in the property vested immediately in the trustee. While loosely it may be said that the grantor retained a life interest in the property,

actually she retained only a chose in action, one of the promises of the trustee being to pay her during her lifetime, an amount equal to the income from the property, less the administration expenses. So far as the transferor was concerned, it would have made no difference had the trustee paid her the same amounts from any other fund, or had the same amounts been made payable by a third person not a party to this transfer. In other words, there is a difference between the retention of a life interest in property and the acquisition of a right to payments measured to some extent by the income from such property. Assuming, however, that the decedent retained an interest for life in the property transferred, she had a well defined estate which vested in her on the date of the transfer and which terminated upon her death.

The trustee also became vested with a definite estate as of that date. It became the owner of the fee with full dominion over the property, except as provided in the trust instrument. This fee was determinable upon the death of the decedent's husband.

On the date of the execution of the instrument, the decedent's husband became the owner of an equitable estate similar to the one held by the decedent herself. He could sell, transfer or pledge it as security for a loan, or otherwise deal with his estate. The fact that the receipt of the income from the estate did not begin until the decedent's death simply meant that *one of the incidents* of the estate was not within his actual enjoyment until that time.

The same may be said about the daughter's rights which vested at the time of the transfer. She was to have the fee upon the death of her father. The fact that she could not have possession or the income of the prop-

erty did not mean that all her rights in the property were postponed, but only some of those rights. The case would not have been different had the income been accumulated and added to the principal until her father's death.

Shukert v. Allen, 273 U. S. 545.

Much was said by the court below concerning the transfer of "economic benefits" which did not take place until the death of the donor (R. 31). Appellant submits that an estate like the one received by the husband or the daughter at the time of the execution of the instrument is an "economic asset" or an "economic benefit." The receipt of the income or the possession or control of the property are some of the manifestations or incidents of this economic benefit. It is true that some of the manifestations or incidents were not realized until after the death of the grantor or until the death of the grantor's husband, but it is not correct to say that there was no transfer of economic benefits until then.

Frew vs. Bowers, 12 F. (2) 626, 627.

C. INTERPRETATIONS OF SUCH CONTRACTS BY THIS COURT.

(1) *An Irrevocable Trust Determines Estates at Time of Transfer.*

In recent years this Court has had occasion to determine the nature and effect of contracts similar to the one at bar. In *May v. Heiner,* 281 U. S. 238, the decedent executed an irrevocable trust which provided that the income be paid to her husband during his life; that at his death, if she survived him, the income should be paid to herself for life, and on her death or on her husband's death, whoever survived, the trust was to cease, and the principal was to be paid to her children. This Court

held that the federal estate tax could not be imposed on the transfer of this property, because the tax was imposed on the transfer of property or any interest therein owned by the decedent at the time of her death, and at her death she retained no interest upon which such tax could be imposed.

The significance of that decision, for the purposes of the present case, is that by the irrevocable trust the decedent parted with her property during her lifetime, retaining only the right to income for life, and that right was extinguished at the time of her death. Mr. Justice McReynolds, delivering the opinion, said (p. 243):

> "At the death of Mrs. May, *no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed.* The interest therein which she possessed immediately prior to her death was obliterated by that event." (Italics supplied.)

This case was followed by three others. In *Commissioner of Internal Revenue v. Northern Trust Company*, 283 U. S. 782, there was an irrevocable trust wherein the settlor reserved a life use with remainders over. The same state of facts was presented by *Morsman v. Commissioner of Internal Revenue*, 283 U. S. 783. In *McCormick v. Commissioner of Internal Revenue*, 283 U. S. 784, the trust instrument provided that the income should be accumulated and added to the principal, except that, if in any year the settlor's net income should be less than a specified amount, she could take from the trust income enough to make up the deficiency, and also that the trustee should pay out of the income any amounts she might designate for charitable purposes. The trust deed created remainders in the settlor's children with a further provision that if she survived them, the property should

revert to her. All these cases were decided on the authority of *May v. Heiner*, supra.

The necessary implication of those decisions was that the transfers in question were not intended to take effect in possession or enjoyment at or after death. That implication as to the nature of the contract was necessary to the conclusion that the federal estate tax was not applicable.

All the above cases were preceded by the case of *Reinecke v. Northern Trust Company*, 278 U. S. 339. There the settlor created five trusts in each of which the income was reserved to another for life or until five years after the settlor's life, whichever was first, with remainders over to others. The settlor reserved a right to revoke each trust with the consent of its respective tenant. This Court held that since the power to revoke was dependent on the consent of the one entitled to the beneficial and, consequently, adverse interest, the trust had passed as completely from the control of the settlor as if the gifts had been absolute. Mr. Justice STONE, delivering the opinion of the Court, said (348):

> "In the light of the general purpose of the statute and the language of Section 401 explicitly imposing the tax on the net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in Section 402 (c) 'to take effect in possession or enjoyment at or after his death', include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under Section 401. That doubt must be resolved in favor of the taxpayer."

(2) *Nature of Transfer Does Not Depend on Nature of Tax.*

In commenting on the above quotation, the Supreme Court of Errors said (R. 30):

> "It is obvious * * * that the decision, upon which the succeeding cases relied, was motivated by the nature of the federal estate tax, which is upon the transfer of, rather than the succession to, property of the decedent."

We think that the court below incorrectly interpreted the reasoning of this Court in *Reinecke v. Northern Trust Company* and the cases which followed. *The imposition of the tax may depend upon the nature of the transfer, but the nature of the transfer does not depend upon the tax.* That is to say, in each of those cases the decedent could have transferred the property in such a manner as to make it subject to a transfer tax or a succession tax or both or neither. But when the tax was imposed, it did not change the nature of the transfer, which had already been accomplished. So in the present case, whether the tax is one imposed on the right to transfer or on the right to succeed to property, that has no relation to the question whether the transfer was one intended to take effect in possession or enjoyment at or after death or whether it was absolute at the time when made.

This is aptly illustrated by the two cases of

> *Nichols v. Coolidge*, 274 U. S. 531, and
> *Coolidge v. Long*, 282 U. S. 582,

which involved the same instruments of transfer. It is true, in both cases the ultimate question for determination was as to the retroactive application of the tax, but in order to reach the conclusion that the retroactive application was unconstitutional, this Court had to deter-

mine the nature and effect of the transfer. As to that Mr. Justice BUTLER said in *Coolidge v. Long*, supra, (p. 597):

> "By the deed of each grantor one-fifth of the remainder *was immediately vested* in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. * * * The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. * * * Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. *Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen.*" (Italics supplied.)

To complete the parallelism between transfer and succession taxes, and their relation to the nature of the transfer, Mr. Justice BUTLER said in *Coolidge v. Long* (p. 598):

> "Succession is effected as completely by a transfer of a life estate to one and remainder over to another as by a transfer in fee. *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 347-348."

The fact that the tax imposed by the State of Massachusetts was a succession tax, and not a transfer tax, made no difference in the decision of this Court. Yet, the opinion of the court below does not mention the case of *Coolidge v. Long*. In the case at bar, as in *Coolidge v. Long*, the death of the settlor was not the generating source of any right in the remaindermen. Nothing moved from her when she died. The rights of the remaindermen, including possession and enjoyment upon the termination of the decedent's life, were derived solely from the deed.

As a matter of fact, such was the holding of the Supreme Court of Errors in *Blodgett v. Union & New Haven Trust Co.*, 97 Conn. 405, 410, concerning the nature and effect of an irrevocable trust. There the deceased had transferred certain securities in trust to pay the income of the fund to the settlor for life and at her death to deliver the fund to her daughter. With reference to the question whether this was a gift to take effect at death, the Court said:

> "The phrase 'gift to take effect at death' in its context, evidently means a gift *in futuro* to take effect at death, of an interest in property possessed by the decedent at the time of his death. The gift in question was a gift *in praesenti* of the remainder interest in property of which the decedent reserved no more than a life interest which was extinguished by her death."

And yet, under the 1913 Act held applicable in the above case, as under the 1923 or 1929 Act held applicable in the case at bar, the Connecticut tax was a succession tax and not a transfer tax.

Blodgett v. New Britain Trust Co., 108 Conn. 715, 720, 145 Atl. 56;
Silberman v. Blodgett, 105 Conn. 192, 201, 202, 134 Atl. 778;
Bankers Trust Co. v. Blodgett, 96 Conn. 361, 365, 114 Atl. 104.

This being the nature and effect of the contract, resulting in the transfer of the property, appellant will proceed to show that its constitutional rights have been violated.

POINT II.

In Imposing The Tax The State Violated Appellant's Rights Under The Contract Clause Of Article I, Section 10 Of The Constitution.

In order to show a violation of the contract clause, it is incumbent upon appellant first to show that the court below has given effect to a statute enacted after the above contract, and that the application of such statute has operated to impair obligations under the contract.

A. THE COURT BELOW ACTUALLY GAVE EFFECT TO A SUBSEQUENT STATUTE.

It is conceded, of course, that in order to show that its rights under the contract clause had been violated, appellant must point to a law passed by the legislature of the state, which on its face varies the rights of parties to a pre-existing contract or which is so judicially applied to a contract in existence at the time of the enactment of the statute as to vary the rights under that contract.

Fletcher v. Peck, 6 Cr. 87;
Dartmouth College v. Woodward, 4 Wheat. 518.

It is also conceded by appellant that a subsequent interpretation of a statute in existence at the time of the contract can not be attacked as violative of the contract clause.

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 451.

But where a state court, in interpreting a prior statute, actually gives effect to a subsequent statute, the protection of the contract clause may be invoked.

McCullough v. Virginia, 172 U. S. 102, 116-7;
Hubert v. New Orleans, 215 U. S. 170, 175;
Carondelet Canal Co. v. Louisiana, 233 U. S. 362, 376;

Louisiana Ry. & Navigation Co. v. New Orleans, 235 U. S. 164, 171;
Long Sault Development Co. v. Call, 242 U. S. 272, 277.

In such cases, before entering upon an examination of the contract, in order to determine whether the rights thereunder have been violated, this Court will first ascertain whether the state court actually gave effect to a subsequent statute. The statements in the opinion of the state court will be given great weight, but this Court will not be bound by the language used; it will look to the actual effect of the decision. As Mr. Justice HUGHES said in *Louisiana Ry. & Navig. Co. v. New Orleans*, 235 U. S. 164, 171:

> "And, in determining whether effect has been given to the later statute, this court is not limited to the mere consideration of the language of the opinion of the state court."

(1) *Test for Determining Application of Subsequent Enactment.*

There are several tests for applying this rule, but appellant relies only on the test most favorable to the appellee; namely, that *where the application of a statute is sustainable only under a subsequent enactment, and not under a prior enactment, it must follow that the state court has given effect to the later statute, any language in the opinion to the contrary notwithstanding.*

The court below distinguished the present controversy from other cases involving the constitutionality of such taxing statutes, by saying (R. 27):

> "None of the transfers involved in the cases now under consideration involve retrospective operation of the law, * * *"

and it concluded its opinion by ruling (R. 36-7) that the property "passed by deed, grant or gift intended to take effect in possession or enjoyment at the death of the grantor or donor within the meaning of the Connecticut succession tax statute *in force at the execution of the instrument of transfer.*" (Italics supplied.)

But in speaking of the applicable statutory provisions, the Supreme Court of Errors recognized no distinction between the prior and subsequent statutes. It said (R. 26):

> "The original Connecticut Act, Chapter 180, Public Acts 1889, Sec. 1, included provisions for a tax on 'property within the jurisdiction of this State, and any interest therein, * * * which shall pass * * * by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, in trust or otherwise.' In 1897 (Public Acts, Chap. 201) this provision does not appear, but it was restored, in substance, by Sec. 3 of Chapter 332, Public Acts of 1915, and has since continued unchanged in any respect materially affecting the present inquiry. General Statutes (1918), Secs. 1261-1271; Public Acts 1929, Chap. 299, Secs. 1 and 2; General Statutes (1930), Chap. 77, Secs. 1360, 1361."

(2) *Judgment Sustainable Only Under Later Statute.*

Appellant submits that there were ample material changes in the statute. The judgment of the court below may be sustained under the 1929 statute, but it is not sustainable under the 1923 statute.

(a) Difference In Basis Of The Tax.

The basis for computing the tax in the 1923 statute is *the property or any interest therein owned by the decedent at the time of his death,* whereas in the 1929 Act,

it is immaterial whether or not the property transferred was owned by the decedent at the time of his death. Property transferred earlier and no longer owned by the decedent may nevertheless be subject to the tax under the later act, if the intent was to have the transfer take effect at or after the grantor's death.

In the present case the transferor retained a life income from the property, which interest became extinguished at the time of her death. It is conceded that had any income from the property received during her lifetime accumulated at the time of her death, such accumulated income would be the proper measure of the tax under the 1923 Act. But the corpus of the trust, with which she had parted four years before her death, could not be taken as a measure of the succession tax, because that was not the property or interest owned by her at the time of her death. Under the 1929 Act, however, if the transfer was intended to take effect at or after death, then the entire property would be the measure or basis of the succession tax.

(b) Presumption As To Nature Of Transfer.

The 1923 statute leaves the question of intent to be determined by competent evidence which may be gathered from the instrument of transfer and from other sources. The instrument of transfer itself contains no evidence of intent to have the transfer take effect at the death of the grantor. On the contrary, such irrevocable trusts have been before this Court in a large number of cases, such as:

Reinecke v. Northern Trust Co., 278 U. S. 339;
May v. Heiner, 281 U. S. 238;
Commissioner of Int. Rev. v. Northern Trust Co., 283 U. S. 782;

Morsman v. Commissioner of Int. Rev., 283 U. S. 783;
McCormick v. Comm'r Int. Rev., 283 U. S. 784;
Coolidge v. Long, 282 U. S. 582;

and it has been invariably held that the transfers took effect not at the death of the grantor, but at the time when the instrument of transfer was executed.

Since the only evidence before the court below was that contained in the written instrument, and there was no other evidence to counteract the written instrument and show that the real intent was to have the transfer take effect at the death of the grantor, the conclusion reached by the court below cannot be sustained under the provisions of the 1923 Act.

The 1929 Act raises a presumption that a transfer in which a life interest is retained by the donor is prima facie intended to take effect in possession or enjoyment at death. Under this Act, if applicable, it would have been incumbent upon the appellant to proceed and show by competent evidence that the decedent intended to part with the property, except the life interest therein, at the time when the instrument of transfer was executed.

In view of the above differences between the 1923 and 1929 Acts, and in view of the fact that the tax imposed is sustainable only under the later statute, it must be concluded that while the court below expressly said that the property was subject to tax under the Act in force at the time of the execution of the instrument, which was the 1923 Act, it actually gave effect to the 1929 Act.

B. APPLICATION OF THE SUBSEQUENT STATUTE CALLS FOR AN INDEPENDENT CONSIDERATION OF THE CONTRACT.

Since the court below gave effect to the later statute, this Court will determine for itself whether there was a contract; what was its effect and whether the statute, as applied, impaired any of the obligations thereunder.

> *Appleby v. City of New York*, 271 U. S. 364, 380;
> *Larson v. South Dakota*, 278 U. S. 429, 433;
> *Coolidge v. Long*, 282 U. S. 582, 597.

In *Appleby v. City of New York*, supra, the Court, in an opinion by Chief Justice TAFT, stated more definitely what it meant by giving "independent consideration" to the nature and effect of the contract (pp. 379-380):

> "Of course we should give all proper weight to its (the state court's) judgment, but we cannot perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration. It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment. In the case before us, the construction and effect of the contract involved in the deeds and covenants depend chiefly upon the extent of the power of the state and city to part with property under navigable waters to private persons, free from subsequent regulating control of the water over the land and the land itself. *That is a state question, and we must determine it from the law of the State, as it was when the deeds were executed, to be derived from statutes then in force and from the decisions of the state court then and since made;* but we must give our own judgment derived from such sources *and not accept the present conclusion of the state court* without inquiry." (Italics supplied.)

If the interpretation of the contract in the case at bar depends on local law, it has also been shown that at the time the trust deed was executed, the law of the state was that a transfer of an irrevocable trust was one *in praesenti*, not *in futuro*.

Blodgett v. Union & New Haven Trust Co., supra.

C. IMPAIRMENT OF OBLIGATIONS UNDER THE CONTRACT.

Appellant has already shown (pp. 10-17, supra) that there was a contract, and that its nature and effect was to fix the various estates in the decedent, the trustee, the decedent's husband and her daughter, as of the time of the transfer.

That the application of the 1929 Act resulted in an impairment of the rights and obligations under that contract follows from the proposition that such tax could be imposed only on the assumption that the property was in the transferor at the time of her death, whereas complete ownership of the property had passed during the life of the donor, and no interest of any kind remained to pass to the donees in consequence of the death which happened later.

Appellant does not claim that a state may not, consistently with the contract clause, impose a tax which would diminish the value of a contract to the taxpayer or make less valuable the fruits of such contract. Undoubtedly the state, in the proper exercise of its taxing power, may diminish the values of contracts, just as it diminishes the value of any other property subjected to taxation.

Orr v. Gilman, 183 U. S. 278;
Chanler v. Kelsey, 205 U. S. 466;

in which this Court sustained the validity of the New York transfer tax law enacted after the decedent had made a will containing a power of appointment. In *Moffit v. Kelley*, 218 U. S. 400, 402-3, this Court sustained an inheritance tax upon community property after the death of the husband, though the taxing statute was enacted after the contract of marriage had been entered into.

See also:

North Missouri R. R. v. Maguire, 20 Wall. 46, 61;
Providence Bank v. Billings, 4 Pet. 514, 562;
Kehrer v. Stewart, 197 U. S. 60;
Murray v. Charleston, 96 U. S. 432, 446;
Lake Superior Mines v. Lord, 271 U. S. 577,

all of which held that a tax upon a right, property, or income taking its source from a contract obligation is not violative of the contract clause. All these cases were cited in the dissenting opinion in *Coolidge v. Long*, supra, pp. 634-8, and as to all of them the dissenting justices were undoubtedly right.

But the discussion of those cases was founded on the following premise:

> "The present tax has no reference to the contract or its obligation save to recognize and observe the existence of both." (p. 634.)

That is just what the Court found to be otherwise upon analysis of the nature and effect of the contract. Since the contract was found to have vested the rights at the time of execution, the Court said (p. 595):

> "The trust deeds are contracts within the meaning of the contract clause of the Federal Constitution. They were fully executed before the taking

effect of the state law under which the excise is claimed. The Commonwealth was without authority by subsequent legislation, whether enacted under the guise of its power to tax or otherwise, to alter their effect or to impair or destroy rights which had vested under them."

In other words, while the state may impose a tax in recognition of a contract, it cannot impose a tax which could be sustained only on the assumption that the contract did not exist or that the obligations thereunder were different from what they actually were.

Wright v. Central of Georgia Ry. Co., 236 U. S. 674.
Farrington v. Tenn., 95 U. S. 679, 683.

In those cases the state itself was a party to the contract, and *Coolidge v. Long* merely added the obvious proposition that the same principle applies where the contract is one between private parties.

Although the tax is imposed on the beneficiaries' right to succeed to the property, the tax is a charge on and is collectible from the estate,

Conn. Laws of 1929, *Ch.* 299, *Sections* 36, 37; *Gen. St.* 1930, *Secs.* 1395, 1396,

and the impairment of the contract obligation results in an additional burden on the estate, which is appellant's cause for complaint.

If, on the other hand, the tax is deemed a burden only on the beneficiaries, then, of course, it follows that the obligations of the decedent and trustee toward them have been impaired, and appellant, as executor, may object in their behalf against this invasion of their constitutional right.

POINT III.

The Tax, As Applied, Violates Appellant's Rights Under The Due Process Clause Of The 14th Amendment.

Appellant does not maintain that the state may not impose a succession tax on transfers intended to take effect in possession or enjoyment at or after death. The right to tax such transfers, as a measure in aid of imposing death duties, has been established.

Nickel v. Cole, 256 U. S. 222
Keeney v. New York, 222 U. S. 525
Saltonstall v. Saltonstall, 276 U. S. 260
Chase National Bank v. United States, 278 U. S. 327, 334 et seq.

Appellant's contention under the due process clause is two-fold; *first*, that the application of the 1929 Act is without due process, and *second*, that under the 1923 statute, the state could not impose a tax on property transferred absolutely *inter vivos*, under the guise of imposing a succession tax.

As a preliminary step in the showing that the tax is in violation of the due process clause, petitioners submit that this Court is not bound by the state court's conclusion as to the nature of the transaction which resulted in the transfer of the property.

A. THE COURT WILL DETERMINE THE NATURE OF THE TRANSACTION.

In order to apply the tax (whether under the 1923 or 1929 Statute) to the present transfer, the court below interpreted the transaction resulting in the transfer as one in which the intent was to have the transfer take effect in possession or enjoyment at the death of the grantor. Without such interpretation of the contract,

the application of the statute would have been undoubtedly without due process. The basis of appellant's claim under the due process clause is that in order to avoid this unconstitutional result, the court below adopted an erroneous interpretation of the contract. Under such circumstances, as in cases where the protection of the contract clause is invoked, this Court will rely on its own interpretation of the contract to see whether the appellant's constitutional rights have been violated. In *Coolidge v. Long*, 282 U. S. 582, 597, Mr. Justice BUTLER said:

> "It is well understood that, when the jurisdiction of this court is invoked to determine whether a state law impairs the rights of the litigant under a prior contract, *or whether the State is depriving him of his property without due process of law in violation of the Fourteenth Amendment and the question turns upon the existence or terms of a contract*, this court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect. That rule is necessary in order that this court may properly enforce these provisions of the Constitution." (Italics supplied.)

But aside from this rule as to the scope of review which this Court will exercise in determining the facts* at the basis of a claim that a constitutional right has been violated, this Court will examine the nature and effect of the transfer under the rule laid down in

Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 270

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290

Fiske v. Kansas, 274 U. S. 380, 385,

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* As to the importance of determining such facts for the purpose of *applying*, as distinguished from *interpreting*, the Constitution, see the dissenting opinion of Mr. Justice BRANDEIS in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 410-411.

namely, *that where it is claimed that a state statute as applied to a given transaction violates a right guaranteed by the Constitution, and the state court, conceding that such application of the statute would be unconstitutional, nevertheless holds the statute applicable by interpreting the transaction to be otherwise than claimed, this Court will follow its own interpretation of the transaction in determining whether the appellant's constitutional rights have been violated.*

The court below treated the provision in the 1923 Act as applicable only to transfers intended to take effect in possession or enjoyment at or after death of the grantor, and it may be assumed that it would have held unconstitutional a succession tax imposed on such transfers as appellant claims the present transfer is. If that is so, then the error of the court below is *at least* in the interpretation of the transaction lying at the basis of appellant's constitutional claims under the due process and equal protection clauses, and therefore this Court will follow its own interpretation of the transaction.

In view of this rule as to the scope of review, and the true nature of the transaction discussed above (pp. 10-17), appellant submits that under either Act the tax is without due process.

B. APPLICATION OF THE 1929 ACT WITHOUT DUE PROCESS.

(1) *Change in the Basis of the Tax.*

Since the 1929 Act changed and widened the basis of the tax from the property owned by the decedent at the time of her death to the property transferred by the decedent during her lifetime, with the result that transfers, not theretofore taxable, became taxable under the

later Act, the retroactive application of that Act is a violation of the due process clause.

This was established with reference to the due process clause of the Fifth Amendment in the cases decided by this Court under the Federal Gift Tax, as applied to gifts made prior to the effective date of the Revenue Act of 1924.

Blodgett v. Holden, 275 U. S. 142
Untermyer v. Anderson, 276 U. S. 440

The principle there enunciated applies equally to the due process clause of the 14th Amendment. As was said by this Court in *Coolidge v. Long*, supra, p. 596:

> "The States are similarly restrained by the due process clause of the Fourteenth Amendment."

If there was any doubt left as to the similarity between the Fifth and Fourteenth Amendments by the decision of this Court in *Coolidge v. Long*, supra, all doubts were dispelled by the decision in *Heiner v. Donnan*, 285 U. S. 312, in which the Court said (p. 326):

> "Nor is it material that the 14th Amendment was involved in the *Schlesinger* case instead of the 5th Amendment as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. *Coolidge v. Long*, 282 U. S. 582, 596."

In so far as the 1929 Act widened the basis or measure of the tax, its application is without due process. In this respect the case is on all fours with *Coolidge v. Long*, supra, and no further argument on this point is necessary.

(2) *Retroactive Application of Presumption Without Due Process.*

The provision in the 1929 Act, that all transfers in which a life interest is reserved shall be construed prima facie to have been intended to take effect at death, is likewise violative of the due process clause, as applied to transfers made prior to the enactment of that statute. The presumption is invalid because it "operates to deny a fair opportunity to repel it."

Western & Atlantic Railroad v. Henderson, 279 U. S. 639, 642

For it is raised as to a person's intent after she has departed this life, and of necessity the entire intent is contained in the writen instrument of transfer.

The transfer in this case was made in 1926, when the statute imposed a tax on transfers *actually* intended to take effect in possession or enjoyment at or after death, and the tax was measured by the decedent's interest in the property at death. The decedent presumably knew that when she made this transfer, she would not subject her estate to an additional tax burden on account of this transfer. In making the transfer, the decedent had a right to rely on this provision in the law, and that her estate would not be diminished because of the fact that she had transferred part of it as a gift. Had she known that a presumption would be raised, treating the transfer as one intended to take effect in possession or enjoyment at or after death, she might have expressed her intent so as to negative the presumption; she might have adopted a different mode of transfer, or she might have refrained from transferring the property altogether, and that quite apart from any intention to avoid the succession tax, for it was expressly stipulated herein that the *transfer was not made in contemplation of death.*

C. PRESUMPTION MADE ABSOLUTE AND WITHOUT DUE PROCESS.

It would seem that the court below applied not a rebuttable presumption, but an absolute presumption, holding, in effect, that *whenever a life income or interest is retained by the donor, the transfer takes place at death* and is therefore subject to the succession tax.

If that presumption was applied under the 1929 Act, then, of course, the tax is without due process.

Assuming, however, that the court below applied the 1923 statute, and not the 1929 amendment, the absolute presumption is still without due process. In applying that statute the court said (R. 27):

> "Transfers such as here involved, * * * that is, to trustees to pay the income to the transferor during life with directions that upon his death the corpus shall be paid to designated beneficiaries, though the trust be irrevocable, have been held by practically all courts, Federal and State, to fall within the meaning of a transfer intended to take effect in possession or enjoyment at or after the death of the transferor, * * *
>
> "* * * our full concurrence with the general view just stated is clearly indicated in *Blodgett v. Union & New Haven Trust Co.*, 97 Conn. 405, 410, 116 Atl. 908."

Whether that is the general holding of the Federal courts is debatable. Surely that was not the holding of this Court in *Coolidge v. Long*, supra. However, the Supreme Court of Errors held, in interpreting and applying the 1923 statute, that *as a matter of law* the reservation of a life income makes the transfer *one intended to take effect* in possession or enjoyment at or after death.

The question then arises whether the state may, by legislative fiat, determine whether the intent was to have the transfer take effect at one time or another, any expression in the instrument of transfer to the contrary notwithstanding. Appellant submits that while a rebuttable presumption, such as found in the 1929 Act, if not retroactively applied, would be valid because of the reasonable relation between such transfers and testamentary dispositions, an absolute presumption must fall within the constitutional prohibition so aptly stated by Mr. Justice BUTLER in the case of *Western and Atlantic R. R. Co. v. Henderson*, 279 U. S. 639, 642.

> "Legislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. *Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property.*" (Italics supplied.)
>
> *Manley v. Georgia*, 279 U. S. 1, 5-6.

An absolute presumption that a transfer was intended to take effect in possession or enjoyment at or after death stands in no better position than an absolute presumption that the transfer was made in contemplation of death.

Schlesinger v. Wisconsin, 270 U. S. 230, 240,
and
Heiner v. Donnan, 285 U. S. 312, 325,

in which the principle was laid down that "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment."

Otherwise, the state may include within the scope of the taxing statute, transfers made *inter vivos*, which are not testamentary in effect, and were not in fact intended to take effect in possession and enjoyment at or after death, though a life interest may have been retained by the grantor, as is the case here.

D. APPLICATION OF 1923 ACT WITHOUT DUE PROCESS.

Even if the court below gave no effect to the 1929 Act, but rested, as the opinion stated, on an application of the statute in force at the time of the transfer, appellant maintains that the application of the 1923 statute was wihout due process.

(1) *Death Duties May Not Be Imposed on Gifts Inter Vivos.*

Appellant's contention is that while a state may impose a succession tax on transfers intended to take effect at death, the state may not, consistently with the due process clause, impose a tax under the guise of a succession tax, on transfers which are absolute during the life of the grantor. While the state may impose a property tax on the property so transferred, or a gift tax, or some other excise, it may not impose such tax as a death duty.

Schlesinger v. Wisconsin, 270 U. S. 230
First National Bank v. Maine, 284 U. S. 312, 330
Heiner v. Donnan, 285 U. S. 312

In the last case, Mr. Justice SUTHERLAND, speaking for the Court, said (p. 328):

> "The thing taxed is the transmission of property from the dead to the living. It does not include pure gifts *inter vivos*. The tax rests, in essence, 'upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested . . . it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties.' *Knowlton v. Moore*, 178 U. S. 41, 56, 57. The value of property transferred without consideration and in contemplation of death is included in the value of the gross estate of the decedent for the purposes of a death tax, because the transfer is considered to be testamentary in effect. *Milliken v. United States*, 283 U. S. 15, 23. But such a transfer, not so made, embodies a transaction begun and completed wholly by and between the living, taxable as a gift (*Bromley v. McCaughn*, 280 U. S. 124), but obviously not subject to any form of death duty, since it bears no relation whatever to death. The 'generating source' of such a gift is to be found in the facts of life and not in the circumstance of death."

Whether the tax imposed is a transfer or succession tax, the generating source of the transfer must be the death of the transferor.

Knowlton v. Moore, 178 U. S. 41, 57, 59.
Edwards v. Slocum, 264 U. S. 61, 62-3
Y. M. C. A. v. Davis, 264 U. S. 47, 50.

While there is a reasonable connection between transfers made in contemplation of death, or those intended to take effect at or after death, on the one hand, and transfers made through testamentary disposition on the other, so that a tax on the former may be regarded as

being in aid of a tax on the latter, there is no reasonable relation between a tax on transfers *inter vivos* and the death duties sought to be imposed. To make property, transferred *inter vivos*, the basis of a succession tax is arbitrary and unreasonable, and therefore contrary to the due process clause.

Taking the rules laid down in the cases heretofore decided by this Court, (1) that **death duties may not be imposed on gifts inter vivos which are not testamentary in character**, *Heiner v. Donnan*, supra, and (2) that **a transfer made through an irrevocable trust, though a life interest may have been retained, is a gift inter vivos which vests as of the date of the transfer**, *Coolidge v. Long*, supra, then (3) the conclusion is inescapable that **property transferred during lifetime through an irrevocable trust is not subject to death duties, unless made in contemplation of death.** And the present transfer, it has been stipulated, was not made in contemplation of death.

(2) *Tax Not Sustainable As a Property or Gift Tax.*

The tax cannot be sustained as a succession tax. Appellant further submits, that the tax is not constitutionally sustainable, either as a property tax or as a tax on gifts *inter vivos*, under the recent rule testing the constitutionality of statutes in the light of other contemporary legislation.

> *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 479-80
> *Continental Baking Co. v. Woodring*, 286 U. S. 352, 369-70

As a property tax, it could not be sustained, because the property was without the taxing jurisdiction of the

state. In 1926, the decedent transferred it to a New York trust company in New York. Under the circumstances, the property itself was not subject to tax by the State of Connecticut.

Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 92.

As a tax imposed on gifts *inter vivos*, it clearly violates the due process clause, because (1) the tax is imposed on property assumed to be still in the transferor in 1930, whereas it had passed to the transferee in 1926, and (2) because the measure of the tax was not the value of the property in 1926, when the gifts were made, but the value in 1930, the date of the decedent's death (R. 37). Such a tax is no less arbitrary and unreasonable than a tax imposed on one person measured by the property or income of another.

Hoeper v. Wisconsin, 284 U. S. 206, 215

And with reference to this the Court said in *Heiner v. Donnan*, supra (pp. 326-7):

> "In substance and effect, the situation presented in the *Hoeper* case is the same as that presented here. In the first place, the tax, in part, is laid in respect of property shown not to have been transferred in contemplation of death and the complete title to which had passed to the donee during the lifetime of the donor; and secondly, the tax is not laid upon the transfer of the gift or in respect of its value. It is laid upon the transfer, and calculated upon the value, of the estate of the decedent, such value being enhanced by the fictitious inclusion of the gift, and the estate made liable for a tax computed upon that value. * * * Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the *Schlesinger* and *Hoeper* cases condemn as arbitrary and

a denial of due process of law. Such an exaction is not taxation but spoliation. 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.' *United States v. Railroad Company*, 17 Wall. 322, 326."

POINT IV.

The Tax, As Applied, Violates The Appellant's Rights Under The Equal Protection Clause.

It would seem that the Supreme Court of Errors attempted to set up a strained construction on the phrase "to take effect in possession or enjoyment" in order to make the tax applicable. In commenting on its former decision in *Blodgett v. Union and New Haven Trust Co.*, 97 Conn. 405, 410, 116 Atl. 908, the Court said (R. 27):

> "We there pointed out that the 'qualifying and enlarging phrase' 'in possession or enjoyment' included in our original succession tax Act (1889), dropped from the law in 1897, and reinserted in 1915, 'marks the difference between a tax on the privilege of succeeding to the property of a decedent, and a tax on the privilege of succeeding to the possession and enjoyment of property which the decedent has conveyed away during his lifetime, reserving only a right to the income during his own life'."

As a matter of fact, this construction is not new to this Court. It was the construction used by the Supreme Judicial Court of Massachusetts in *Coolidge v. Long*, 268 Mass. 443, 167 N. E. 757, in order to avoid the retroactive application of the tax. That court said (pp. 447, 448, 449):

> "The 'tax authorized by these statutes is a tax upon "succession" which includes the "privileges

> enjoyed by the beneficiary of succeeding to the possession and enjoyment of property". * * *"
>
> It is manifest from the terms of the declaration of trust that the death of the survivor of the settlors was expressly fixed as the effective date of succession by the final beneficiaries to the enjoyment of the principal and income of the trust estate."

We accept this construction of the statute, but maintain that it only increases the constitutional difficulties. The best answer to this distinction between succession to the property of a decedent and succession to possession and enjoyment is found in the opinion of the Supreme Court of Pennsylvania in *Houston's Estate,* 276 Pa. 330, quoted with approval in *Coolidge v. Long,* supra, (p. 604):

> "Nor can it be successfully argued that the tax is not on the transfer of title to the property, but on the transfer of enjoyment, for, as it seems to us, the act means by this the right of enjoyment, and this was vested under the deed. If the tax is imposed when enjoyment is perfected by actual possession, and this theory is carried to its logical conclusion, it would seem that if, during the administration of an estate, delays occur, as they necessarily must, and if, before actual distribution is made, the rate of taxation is changed, a legacy would be taxed at the changed rate, which would appear to be *reductio ad absurdum.*"

But there are further reasons why this construction leads to the invalidity of the statute. In attempting to avoid the retroactive operation of the tax, the state court in *Coolidge v. Long* really changed the effect of the tax from one on succession to property upon death to mere commencement of ability to spend the income or corpus of the trust. In other words, it was not a succession tax. This change in the nature of the tax was recognized in the

dissenting opinion written by Mr. Justice ROBERTS, when he said (p. 634):

> "Receipt in possession and enjoyment is as much a taxable occasion as the enjoyment of any other incident of property."

Likewise appellant submits, if the Supreme Court of Errors meant that the tax was not one imposed upon the privilege of succeeding to the property of the grantor because of her death, but a tax merely on coming into possession and enjoyment after the death of the grantor, without the necessary causal relation between the death and the succession, that is, without death being the generating source of the succession, then this is not an inheritance tax. It is neither a transfer nor a succession tax, but a gift tax, limited in its application to instances where the ability to enjoy some of the attributes of the gift ripens after the death of the donor. Such a tax on gifts clearly violates the equal protection clause.*

First, the state of Connecticut imposes no tax on gifts *inter vivos*, and to single out transfers in which one reserves a life estate as a separate class for taxation is so arbitrary and unreasonable as to violate this constitutional limitation. We repeat that gifts made in contemplation of death, or those intended to take effect at or after death of the donor may be classed for taxation together with testamentary dispositions. Their classification as such is not arbitrary and unreasonable, because they are testamentary in effect, and may be taxed *in aid* of taxes imposed on transfers made through testamentary dispositions or by operation of the intestacy laws. This reason is lacking in the present case.

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* That such a tax violates the due process clause has already been shown. See pp. 36-37, supra.

As a practical matter, the state may draw within its taxing net most of the successions to possession or enjoyment at or after the death of the grantor, by raising a presumption that the reservation of a life income in the grantor shall be evidence of intent to have the transfer take effect at death. That is exactly what the State of Connecticut did in the 1929 Act. But even there the tax is sustainable not by the mere coming into possession or enjoyment after the death of the grantor, but by the intent to substitute this mode of transfer for a testamentary disposition. In other words, the *death of the grantor must nevertheless be the generating source of the transfer.*

Second, assuming that a tax on succession to possession or enjoyment, without death as a generating source, is based on a presumably reasonable classification, though other gifts are not taxed, the tax would operate so arbitrarily and unequally as to be contrary to the equal protection clause. For example:

(a) It would be most arbitrary and unreasonable to differentiate between coming into possession or enjoyment after the death of the grantor and the same event occurring before the death of the grantor, where the transfer was complete before, and had no relation to, the death of the grantor. Thus, if A transferred his property to B absolutely in 1926, and before coming into possession or enjoyment of the property, B became subject to a civil disability which prevented his coming into possession or enjoyment until after the death of A, the State could not impose a succession tax upon the removal of B's disability.

(b) It would be most arbitrary to impose a tax on a gift not intended to take effect at or after death, but in which the transferor retained a life interest, and not to

impose a like tax upon the same gift less an amount which would be equivalent to a life interest computed upon mortality and probability tables.

(c) Suppose A had transferred his property absolutely to B, with the provision, however, that the income from the property should be accumulated and added to the principal for a period of 20 years. Would it be reasonable to impose a tax if A lived less than 20 years, but not to impose such a tax if he lived for more than 20 years? The imposition of such tax would then depend not on the gift or transfer, but on such unrelated and accidental causes as may enter into the death of the grantor.

(d) The same conclusion must be reached if A transferred the property absolutely to B with the provision that the income from the property be paid to C for life. Would it be reasonable to impose a tax if C survived A, but not if A survived C?

These examples of arbitrary discrimination can be multiplied indefinitely.

Wherefore appellant prays that the judgment of the court below be reversed.

Dated November, 1932.

Respectfully submitted,

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